

# Hello – and Goodbye! How Royal Powerplay aborted Malaysia's ICC Membership

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After years of contested legitimacy, two simultaneous announcements on opposite sides of the globe further challenged the effectiveness and geographical reach of the International Criminal Court (ICC). On 5 April 2019, the United States [revoked](#) the visa of the ICC chief prosecutor, Fatou Bensouda, because of her attempts to investigate allegations of war crimes in Afghanistan, including any that may have been committed by American forces. On the same day, Malaysia's Prime Minister Mahathir Mohamad [announced](#) that his country was withdrawing its signature from the Rome Statute, just one month after [having signed](#) it. Did the Malaysian drama just coincide with Washington's move? The most likely answer is yes.

On the one hand, the United States continue to pressure countries not to join the ICC. According to the U.S. [American Service-Members' Protection Act](#) of 2002, no military assistance may be provided to the government of a country that is a party to the ICC. Whereas NATO members and other key allies are exempted from this clause, the U.S. President is also empowered to waive this prohibition in the national interest and for countries that have entered into an agreement that prevents the ICC from proceeding against United States personnel present in such country.

Since 2003, the United States have signed such bilateral non-surrender agreements with [more than a hundred countries](#). In Southeast Asia, the two ICC member states [Cambodia](#) and [East Timor](#) and the non-member states [Brunei](#), [Laos](#), [the Philippines](#), [Singapore](#) and [Thailand](#) have agreed to such arrangements. Malaysia, however, has not. This would have made Americans vulnerable had Malaysia become a state party.

However, the reasons for Malaysia's backtracking appear to be of a largely domestic nature, reflecting political powerplay over constitutional concerns. The case not only illustrates the constitutional ramifications and alleged uncertainties relating to the position and immunities of heads of state and royal rulers under the Rome Statute. It also shines a light on the long-existing tensions between Malaysia's federal government, especially under Prime Minister Mahatir, and the country's royalty.

## Malaysia's aborted ICC membership: What happened?

Malaysia's decision to join the ICC was seen as a strong response to the [Philippines' departure](#) from the Court which became effective only three weeks earlier. The ICC's foothold in Southeast Asia is particularly fragile. After the Philippines's goodbye,

Cambodia was the only ICC member among the ten ASEAN countries. Timor-Leste is the second Southeast Asian state party. Thailand signed the Statute in 2000 but did not proceed to ratification. An [explanation](#) of this [Southeast Asian hesitation](#) may be found in distinct attitudes and principles within and between ASEAN countries.

Malaysia took part in the Rome Conference in 1998 but refrained from further steps for several years. Since 2010, the country's political leadership expressed with rising frequency the intention to join. More recently, several [factors](#) contributed to this development. First and foremost, Mahathir Mohamad's Pakatan Harapan coalition won the May 2018 general election. This "[Malaysian Tsunami](#)" was followed by the appointment of a new Attorney General and certain, however limited [steps](#) toward restoring the rule of law and rights protection in Malaysia. Secondly, the genocidal acts against the Rohingya people in Myanmar since 2017 received strong attention in Malaysia and sparked unexpectedly outspoken [accusations](#) by the Foreign Minister. Thirdly, the downing of Malaysian Airlines flight MH17 over Ukraine in 2015 [nourished discussions](#) about the benefits of ICC membership and the possibilities of referring that case to the Court.

In December 2018, the Mahatir Cabinet finally decided to join the ICC. On 4 March 2019, Malaysia deposited the instrument of accession – but withdrew only a month later. What happened? Foreign Minister Saifuddin Abdullah [said](#) the withdrawal was a political move to avoid a coup attempt by the "deep state" and referred to the opposition "whipping up political sentiments using the issue of Malay Rulers." Mahatir himself [told](#) a press conference, "the whole idea is to get the royalty in Malaysia to go against this government. That is the motive." He [continued](#), "the police and military are also fundamentally Malay-based institutions. That is why it is very important for us to handle this issue with care."

Indeed, only a few days after signing the Statute in March, the Crown Prince of the state of Johor, Tunku Ismail Ibni Sultan Ibrahim, [tweeted](#) that the government had failed to consult the Conference of Rulers when it agreed to accede to the Rome Statute and that the government had undermined the Rulers' position. He also [mentioned](#) the possibility of "orchestrated war crimes", intended to bring down the King. The Sultan of Johor, Ibrahim Ibni Almarhum Sultan Iskandar, [conflating](#) issues though, [said](#) that the Rome Statute along with the – [equally unsuccessful](#) – attempt to ratify the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) had touched on the monarchy, Malay privileges, and the sanctity of Islam. And one day before the withdrawal, opposition leader Datuk Seri Ismail Sabri Yaakob [filed](#) a bill in parliament urging the federal government to withdraw from the Rome Statute.

## **Mahatir vs. the royals: A history of tensions with constitutional consequences**

These events need to be put into perspective. Since Mahatir became Prime Minister again last year, he has locked horns with the Crown Prince of Johor over several issues, including the housing mega-project [Forest City](#) in Johor, a [national park](#),

a [cargo transfer hub](#) and, more generally, the [policies](#) of the federal government. These exchanges partly took place at a time when the previous King, Sultan Muhammad V., was on medical leave and then abdicated the throne in early January in an unprecedented move. The new King, Al-Sultan Abdullah of Pahang, was [sworn in](#) on 31 January 2019.

Only weeks ago, a new Johor chief minister (Menteri Besar) had to be [appointed](#) after his predecessor, a Mahatir-confidant, had quit amid speculation that the Sultan of Johor wanted him removed from his post. This prompted Mahatir to [remind](#) the Sultan and the Crown Prince that Malaysia is “not an absolute monarchy.”

The powerplay between Mahatir and Johor’s royal family illustrates the [often-delicate relations](#) between the government and Malaysia’s royalty, dating back to the late colonial era, the early years of independence and, in particular, Mahatir’s first Prime Ministership between 1981 and 2003.

After the Second World War and three years of Japanese occupation, British rule returned, and the old and new colonial power oversaw the brief and unsuccessful existence of the Malayan Union (1946-48), a quasi-federal system, in which the Malay Rulers were forced to cede full jurisdiction over their state territories to the British Crown. The subsequent formation of the Federation of Malaya in 1948 comprised the nine Malay states plus Penang and Malacca and was governed by a federal government under a British High Commissioner. This arrangement already established stronger representation mechanisms for Malays in the legislative process.

In 1957, following the global trend of decolonization, the Federation of Malaya obtained independence under a constitution which aimed at safeguarding the position and prestige of the Malay Rulers, with a federal Head of State chosen from among them. In 1963, the “Malaysia Act” then effectuated the necessary constitutional changes to establish the current Malaysia, which initially included Singapore until the city state was expelled from the federation in 1965. Since then, Malaysia consists of 13 states (nine of them ruled by hereditary Malay Rulers) and three federal territories.

Under Malaysia’s federal and state constitutions, the Malay Rulers are [constrained](#) by Westminster-style conventions, and the King is generally required to act upon the advice of the executive. For some time, this arrangement has worked fairly well for the Rulers. However, with Mahatir Mohamad becoming Prime Minister for the first time in 1981, the federal government responded to some Rulers’ open disregard of the law and extravagant lifestyles financed by the taxpayers. Mahatir, showing little deference to the Rulers, initiated crucial constitutional amendments that curtailed royal privileges and shifted the balance of powers in the Malaysian constitutional system.

In 1983, he pushed through a constitutional amendment that removed the necessity of royal assent for the enactment of bills, limiting the King’s power to a delay only (Art. 66). Ten years later, following instances of physical violence in the Royal House of Johor, the Constitution (Amendment) Bill of 1993 effectively removed the Rulers’

personal immunity and created a Special Court in respect of anything done in the exercise of their functions under the written law (Art. 181). Moreover, the King and the Rulers were barred from pardoning themselves or their children (Art. 42). Several other benefits were legally withdrawn including passport and travel privileges, certain service facilities and staff, and overly extensive media coverage.

Since Mahatir stepped down in 2003, however, academics [noted](#) a steady “rejuvenation” of the Malay royalty, even to the extent of assuming the role of constitutional defenders, countering, for example, [religious extremism](#). This role-change was largely due to the rising levels of corruption and abuse of power by the political class, a recent example being the 1MDB scandal which implicated former Prime Minister Najib Razak.

Against this historic and constitutional background, many observers were only mildly surprised when, after the 2018 election, it [appeared](#) as if the King tried to delay Mahatir being sworn in as Prime Minister. However, the long-standing tensions also provoke to scrutinize the constitutional arguments advanced against the ratification of the Rome Statute.

## **The constitutional concerns against Malaysia’s ICC membership**

Several arguments have been [raised](#) against Malaysia joining the ICC. Most importantly, it was claimed that becoming a signatory to the Rome Statute would make the King liable to prosecution in his role as Supreme Commander of the Armed Forces of the Federation (Art. 41). However, in Malaysia’s Westminster-style system, the King “shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet” (Art. 40A(1)). Regarding the military, the [Armed Forces Act of 1972](#) does not indicate anything to the contrary. It is therefore highly [unlikely](#) that the ICC could establish the King’s individual or command responsibility under the Rome Statute (Art. 25 and 28, Rome Statute).

The Crown Prince of Johor alleged that ratification would “directly affect the privileges, position, honors or dignities of the Rulers”, invoking Article 38(4) according to which a law having such effect could only be passed with the consent of the [Conference of Rulers](#), which is a council of the nine Malay Rulers and the governors of the other four states. Though the Cabinet informed the King, the Conference of Rulers was indeed not involved.

On the one hand, the signing and ratification of the Rome Statute clearly does not affect the Rulers’ position under Malaysian criminal law because any former privileges were already removed by the afore-mentioned 1993 constitutional amendment. In this respect, the King and the Ruler can be tried by the Special Court (Art. 182).

On the other hand, joining the ICC results in the irrelevance of functional and personal immunities on the international level *vis-à-vis* the ICC (Art. 27, Rome Statute). Though the ICC’s Appeals Chamber [very recently asserted](#) that heads of

state have no immunity from criminal prosecution in international criminal courts under customary international law anyway, this opinion is extremely [controversial](#) and has been repeatedly [rejected](#) in academia. Therefore, the ratification indeed exposes holders of functional or personal immunities to international criminal prosecution, under the conditions of actual, not only symbolic, individual or command responsibility and with due regard to the complementarity principle.

According to the Rome Statute's complementarity principle, a case is inadmissible if it is being investigated or prosecuted by a member state which has jurisdiction over it, unless that state is unwilling or unable genuinely to carry out the investigation or prosecution (Art. 17(1)(a), Rome Statute).

As a result, when considering the King's and Rulers' limited power under the federal constitution as well as Malaysia's constitutional practice, joining the ICC is unlikely to affect the Rulers' privileges in terms of international criminal responsibility. Only if, Malaysian royalty assumed a more active role in police and military affairs could ICC jurisdiction theoretically be triggered. It therefore remains questionable why the Rulers would want to protect themselves against the purely hypothetical prosecution of genocide, crimes against humanity, war crimes or aggression.

## Another setback in Southeast Asia

After all, the Malaysian episode was another setback for international criminal justice in Southeast Asia after the Philippines effective withdrawal only weeks earlier. This leaves Cambodia and Timor-Leste as the two remaining ICC member states in the region. The Mahatir administration's ability to enhance and promote the protection of human rights has been questioned. However, in its defense, one must admit that the intentional mix-up between "ICERD" and "ICC" by some actors made a rational discussion about the actual constitutional impacts of ratification extremely difficult.

Finally, the issue of royal immunities remains an impediment in the efforts of several countries to join the ICC. In Thailand, a Rome Statute signatory, [similar concerns](#) appear to prevent the country from moving toward ratification. The bottom line, however, remains that largely ceremonial heads of state do not have anything to fear.

